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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LUSSON, BRYANT KUSHMICK, ALEXANDER SAENZ, JOHN DENOMA, and NORA PENNER, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

APPLE, INC., a California Company,

Defendant.

No. 3:16-cv-00705-VC

PLAINTIFFS' OPPOSITION TO DEFENDANT APPLE INC.'S MOTION TO DISMISS SECONDED AMENDED CLASS ACTION COMPLAINT

Hearing Date: June 16, 2016
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria
Courtroom: 4

Initial Complaint Filed: February 11, 2016

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I. INTRODUCTION

Defendant Apple, Inc.'s ("Apple")'s motion to dismiss all of the claims in Plaintiffs the Second Amended Class Action Complaint ("SAC") should be denied in its entirety.

II. STATEMENT OF FACTS

Apple is the designer and manufacturer of its enormously popular iPhone smartphones as well as its iPad tablet computers (collectively, the "Affected Devices."). (SAC ¶¶ 3, 6, 72). Apple also designed and created all versions of the operating system software that runs on the Affected Devices, iOS (collectively, the "Operating Systems"). (*Id.* ¶¶ 14, 72).

Apple also touts the Affected Devices' intentionally-designed security features as a major marketing point. Particularly, as early as February 2014, Apple trumpeted: "System security is designed so that both software and hardware are secure across all core components of every iOS device." (SAC ¶¶ 11; 24; Declaration of Darrell L. Cochran ("Cochran Decl." Ex. A at 4; Ex. B at 5; Ex. C at 5). Apple also stated, "The tight integration of hardware and software on iOS devices ensures that each component of the system is trusted, and validates the system as a whole." (*Id.*) However, Apple also offered the public the following unequivocal promise: "This architecture is central to security in iOS, and *never gets in the way of device usability*." (*Id.*) (emphasis added).

Apple's marketing also emphasizes the intentionally-designed, allegedly seamless integration of its devices' hardware, software, and software updates. (SAC ¶ 12). According to Apple, "Users receive iOS update notifications on the device and through iTunes, and updates are delivered wirelessly, encouraging rapid adoption of the latest security fixes." (SAC ¶ 13; Cochran Decl. Ex. A at 5; Ex. B at 6; Ex. C at 6). However, Apple's "encouragement" to adopt software updates verges on insistence. The Operating Systems cause a frequently-recurring prompt to appear on a user's device until the user installs the update. (SAC ¶ 13). Apple's marketing has offered consumers bold promises about its software updates, like the following July 24, 2015 ad on its website:

> Every iPhone we've made – and we mean every single one – was built on the same belief . . . . It should have hardware and software that were designed to

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> work with each other. And enhance each other . . . . *And whenever there are shiny, new software updates with shiny, new features, you should be able to sit back, relax, and know your phone will get them. And be compatible with them. For years.* For free.

(*Id.* ¶ 12; Cochran Decl. Ex. D; Ex. E) (emphasis added).

Error 53 arises from a particular feature of the integrated security architecture. Specifically, the Affected Devices, the Operating Systems, or both contain a feature that attempts to verify whether the device's original Touch ID sensor is still present within the device when installing Operating System updates or restoring the device from a backup. (SAC ¶¶ 15-16). If the attempt fails, the feature—described by Apple as a "security check[]"—is triggered and the device displays an "Error 53" message. (*Id.*)

Error 53 renders Affected Devices entirely useless and inoperable (and any data thereon inaccessible), colloquially known as "bricking" the device. (*Id.* ¶¶ 18; 23). Unfortunately for consumers, other circumstances than the original Touch ID sensor's absence triggered Error 53, including replacements of a device's screen or other parts; Touch ID sensor malfunctions; minor liquid damage; or no apparent reason at all. (*Id.* ¶¶ 19-22). Error 53 would brick the devices under such circumstances even though the device otherwise worked. (*Id.* ¶¶ 47, 51, 57, 62, 66).

Apple's first official statements about Error 53 on February 5, 2016—nearly a year after the issue gained widespread attention and a mere six days before Plaintiffs filed suit—left no doubt that Error 53 was an intentional security feature, not a bug, designed in part to ensure that only Apple or its Authorized Service Providers could repair devices without a subsequent bricking. According to Apple,

> We protect fingerprint data using a secure enclave, which is uniquely paired to the touch ID sensor. When iPhone is serviced by an authorised Apple service provider or Apple retail store for changes that affect the touch ID sensor, the pairing is re-validated. This check ensures the device and the iOS features related to touch ID remain secure. Without this unique pairing, a malicious touch ID sensor could be substituted, thereby gaining access to the secure enclave . . . .

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> When an iPhone is serviced by an unauthorised repair provider, faulty screens or other invalid components that affect the touch ID sensor could cause the check to fail if the pairing cannot be validated. With a subsequent update or restore, additional security checks result in an 'error 53' being displayed . . . .

(*Id.* ¶ 15; Cochran Decl. Ex. F). Despite its apparent knowledge of Error 53, however, Apple never previously told consumers that the Affected Devices, Operating Systems, or both contained features that would brick their devices under certain circumstances; Apple had intentionally increased the risk of Error 53 bricking a device when consumers utilized the services of third-part repair vendors; and attempting to install Operating System updates would trigger Error 53. (SAC ¶¶ 24-25, 29, 76-77, 79-80, 85-86, 96, 105-106, 114-115, 124). What Apple was willing to tell affected consumers, however, was conveniently profitable: Error 53 was entirely the fault of the consumer and the only "solution" to Error 53 was to purchase a replacement device. (*Id.* ¶¶ 4, 48, 53, 58, 68).

Each Plaintiff purchased an Affected Device between March 2014 and July 2015. (*Id.* ¶¶ 46, 50, 56, 60, 65). Plaintiffs all had minor repairs of their devices performed by third-party vendors or themselves with the exception of Plaintiff Kushmick, who suffered a cracked Home button and never sought repairs. (*Id.* ¶¶ 47, 51, 57, 62, 66). All of their devices operated normally —with the exception of Touch ID— after the repairs. (*Id.* ¶¶ 47, 51, 57, 62, 66-67). Each Plaintiff's devices was bricked by Error 53 while attempting to install Operating System updates. (*Id.* ¶¶ 48; 52; 57; 63; 67). Plaintiff Kushmick's and Penner's devices were bricked by Error 53 less than one year after purchase. (*Id.* ¶¶ 14; 50; 52; 65; 67). Plaintiff Saenz lost data stored on his device that he was unable to backup. (*Id.* ¶ 57). Apple told Plaintiffs Lusson, Kushmick, Saenz, and Penner their only option was to purchase a replacement device. (*Id.* ¶¶ 48, 53, 58, 68). Plaintiff Kushmick did so. (*Id.* ¶ 54).

In choosing to purchase their devices, utilize third-party repair vendors, and attempting to install Operating System updates, Plaintiffs relied on Apple's misrepresentations that the security features of the Affected Devices and Operating Systems would "never get in the way of device usability" and Operating System updates were designed to "enhance" their devices

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and would be "compatible" with their devices "for years." (*Id.* ¶¶ 91, 97, 106, 115). Plaintiffs also relied on Apple's omissions regarding the bricking features contained within the Affected Devices, the Operating Systems, or both; the increased risk created by Apple of a bricked device after utilizing a third-party repair vendor; and installation of the Operating System updates functioning as the trigger for Error 53. (*Id.*) Plaintiffs would not have made the same choices had they known of the falsity of Apple's representations or of Apple's omissions. (*Id.* ¶¶ 49, 55, 59, 64, 70, 91, 97, 106, 125).

On February 11, 2016, Plaintiffs filed their original complaint. (Dkt. 1). Seven days later, Apple announced a software update that supposedly restores full operability to devices bricked by Error 53 and indicated a conditional willingness to entertain the possibility of issuing reimbursements to customers who purchased an out-of-warranty replacement device. (Dkt. 27-2 at 2). Specifically, Apple's website stated: "*If you believe* that you paid for an out-of-warranty device replacement based on an error 53 issue, contact Apple support *to ask* about reimbursement." (Dkt. 27-2) (emphasis added). Other than this vague reference to request reimbursement from Apple, its website is devoid of any details about the purported reimbursement program.

Apple now claims—through submission of a "form email" sent to no one in particular—that it provided notice of its reimbursement program to consumers for whom Apple's records indicate they "paid for a service request related to an 'Error 53' iTunes connection issue." (Dkt. 27-1 ¶5; Dkt. 27-4). However, Apple presents no proof that Plaintiffs ever received this purported "notice" or any offer of reimbursement; in fact, Plaintiffs Saenz and Penner have not. (Declaration of Alexander Saenz ("Saenz Decl.") at ¶¶ 11-12; Declaration of Nora Penner ("Penner Decl.") at ¶ 27-28).

Likewise, Plaintiffs had dismal results with Apple's alleged Error 53 software fix and purported reimbursement program. Plaintiff Saenz twice attempted to install the update using the step-by-step instructions provided by Apple. (Saenz Decl. ¶¶ 8-10). His first attempt, after

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receiving numerous other error messages and failing multiple times, was ultimately unsuccessful, and after another arduous attempt, Plaintiff Saenz was able to restore his device's operability but lost all the non-backed-up data on the device. (*Id.* ¶¶ 8-10). Similarly, Plaintiff Penner's attempt to install the update also failed to restore her device's operability. (Penner Decl. ¶¶ 9-18). Finally, Plaintiff Penner made two attempts to contact Apple to "ask" about reimbursement; in each instance, she waited on hold for thirty-nine and 30 minutes, resulting only in a dropped call and no answer. (*Id.* ¶¶ 19-20).

III. LEGAL ARGUMENT

A. Plaintiffs' Claims Are Not Moot

Apple contends that Plaintiffs' suit should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction based on extrinsic evidence of its purported remedial actions announced after Plaintiffs filed suit. Apple's "factual" challenge is subject to a burden-shifting scheme: once the movant presents evidence sufficient to challenge subject matter jurisdiction, the nonmoving party must present refuting evidence. *Long v. Graco Children's Products Inc.*, 2014 WL 7204652, at *2 (N.D. Cal. Dec. 17, 2014). Uncontroverted allegations in the complaint must be taken as true, and "conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor . . . ." *Nasoordeen v. Fed. Deposit Insurance Corporation*, 2010 WL 1135888, at *5 (C.D. Cal. March 17, 2010) (alteration in original).

Apple first asserts constitutional mootness. "Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation that forestall *any occasion for meaningful relief*." *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997) ("*S. Utah*") (emphasis added). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189-90, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). Moreover, where a plaintiff's lawsuit seeks relief

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exceeding that affirmatively offered by defendants, a case is not moot. *Philips v. Ford Motor Company*, 2016 WL 693283, at *7-8, *11 (N.D. Cal. Feb. 2, 2016).

Apple does not meet its initial burden of establishing that its remedial actions moot Plaintiffs' claims. For example, in *Long*, Defendant Graco argued that a pre-suit offer of a full refund to Long and a post-suit national recall of children's seats with the defective buckles rendered his claims for monetary compensation moot. 2014 WL 7204652, at *3. The *Long* court held—even assuming *arguendo* that Graco's "weak" and "at best, ambiguous" evidence shifted the burden despite no definitive evidence of a pre-suit offer to Long—Long easily rebutted Graco's contention with evidence that Graco had offered only partial reimbursement. *Id.* Graco also claimed it had offered a full refund through the recall. *Id.* However, none of the recall notices offered "a full refund as a *standard* part of the recall program," and Graco "did not present any evidence showing that even one purchaser of the millions of car seats it recalled actually received a full refund." *Id.* (emphasis added).

The *Long* court concluded that Graco's motion was "all smoke and no fire about whether Graco actually tendered refunds to Long before or after th[e] lawsuit started." *Id.* It reasoned that the cases cited by Graco, such as *Tosh-Surryhne v. Abbott Laboratories, Inc.*, 2011 WL 4500880, at *4 (E.D. Cal. Sept. 27, 2011), actually "underscore[d] this proof deficit" because "[t]hose cases had clear evidence of actual payment or an actual offer of full refunds." *Id.* at *4. Accordingly, the court concluded that these "evidentiary failures doom[ed] Graco's motion." *Id.*

Apple's similar evidentiary failures doom its motion. Similar to the evidence in *Long*, the form email contains no indication that it was sent to Plaintiffs or any other putative class member. (Dkt. 27-4). Accordingly, Apple fails to demonstrate that any "offer" contained within the form email was made to Plaintiffs. Similarly, to any extent the reimbursement plan details contained in Apple employee James Johnson's declaration constitute an "offer," Johnson does not claim that those details have been provided to Plaintiffs or any other putative class

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member or that anyone actually is receiving reimbursement. (Dkt. 27-1). Instead, Apple's only official, public "notice" of reimbursement consists of a general and highly equivocal invitation to inquire about the *possibility* of reimbursement. (Dkt. 27-2). As such, Apple's evidence of the abstract possibility of reimbursement is a "far cry" from the express offers of refunds "firmly in hand" in *Tosh-Surryhne*.[1] *Long*, 2014 WL 7204652 at *4.

Moreover, even had Apple met its burden, Plaintiffs' seek monetary compensation in excess of Apple's purported remedial program, including reimbursement for the purchase price of newly-purchased devices or the purchase price of bricked devices. And, as Apple tacitly admits in its motion, Plaintiffs' claims for "ancillary relief, including punitive damages… interest, and consequential damages," are not moot if they survive Apple's Rule 12(b)(6) motion. They do.[2] Thus, at the very least, these claims are not constitutionally moot.

Second, Plaintiffs' claims are not prudentially moot. Courts have applied the doctrine "only where a plaintiff seeks injunctive or declaratory relief." *Phillips*, 2016 WL 693283, at *7 (internal quotation marks omitted). Here, Apple provides no persuasive rationale for extending the doctrine to Plaintiffs' damages claims. Moreover, *Cheng v. BMW*, 2013 WL 3940815, at *1, *4 (C.D. Cal. July 26, 2013) and *Winzler v. Toyota*, 681 F.3d 1208, 1209-1211 (10th Cir. 2012), cases cited by Apple, actually illustrate why the doctrine should not be applied to any claim in this case. Both cases involved putative class actions seeking only injunctions requiring repairs or a comprehensive notice and equitably-funded repair program; both

[1] Apple also cites *Graham v. DaimlerChrysler*, 34 Cal. 4th 553, 560 (2004) and *MacDonald v. Ford*, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015), but those cases addressed only an awards of attorney fees, not mootness.

[2] Apple claims that any claims for consequential damages are barred by the disclaimers in its Limited Warranty. (Dkt. 27 at 17). However, contractual limitation of liability clauses are void and unenforceable under California law to the extent they would insulate Apple from liability for Plaintiffs' claims based on intentional misconduct. *WeBoost Media S.R.L. v. LookSmart Ltd.*, 2014 WL 2621465, at *9-10 (N.D. Cal. Jun. 12, 2014); *Farnham v. Super Ct.*, 60 Cal. App. 4th 69, 71 (1997); *McQuirk v. Donnelley*, 189 F.3d 793, 796 (9th Cir. 1999) (quoting the *Farnham* rule).

Apple also claims that Plaintiffs' claims for punitive damages die with their negligence, negligent misrepresentation, and CLRA causes of action. But, as discussed below, those claims survive Apple's motion. Apple further claims, citing to negligence and gross negligence cases, that its conduct does not warrant punitive damages. (Dkt. 27 at 16). Here, in addition to mere negligence or gross negligence, Plaintiffs have alleged theories that Apple intentionally designed the Affected Devices and Operating Systems with features that would brick the devices in order to increase its profits by inducing consumers to buy new devices and capturing the repair market. Punitive damages are available in California, among other circumstances, in cases of fraud or where a plaintiff shows the defendant's conduct was "intended to cause injury . . . to the plaintiff." *Molina v. J.C. Penney Company, Inc.*, 2015 WL 183899, at *3 (N.D. Cal. Jan. 14, 2015).

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defendants initiated voluntary product recalls that included promises to repair or replace the defective products at issue; and, both recalls were overseen independently by a government agency and the defendants were statutorily required to provide notice of the recalls to all affected consumers. *Cheng*, 2013 WL 3940815 at *4; *Winzler*, 681 F.3d at 1209-1211. Both courts observed that "promises of reform or remedy aren't often sufficient to render a case moot as a constitutional matter," but concluded the lawsuits were prudentially moot because the defendants' promises to provide the precise relief sought by the plaintiffs, coupled with notice provided to affected consumers and the government's "continuing oversight" and "ability to ensure [the defendants'] full compliance through fines," obviated the need for injunctive relief through a class action lawsuit. *Cheng*, 2013 WL 3940815, at *4; *Winzler*, 681 F.3d at 1211.

Here, in addition to injunctive relief, Plaintiffs request monetary damages exceeding Apple's alleged reimbursement program. Moreover, Apple is not statutorily required to provide notice of the program to all affected consumers. Indeed, Apple admits it has provided email notice only to "consumers (based on Apple's records) who paid Apple for an out-of-warranty repair or replacement due to Error 53." (Dkt. 27-1 ¶ 5). This notice excludes a separate category of affected consumers—those who "purchased a new device instead (from Apple or otherwise)." (SAC ¶54 (Plaintiff Kushmick); Dkt. 27-1 ¶4). The notice excludes those consumers for whom Apple's service records omit any reference to Error 53 in connection with a repair and replacement.

Furthermore, unlike the government oversight of *Cheng*'s and *Winzler*'s recalls, here the Court has only Apple's claim that it will, at some indeterminate time, provide the purported reimbursements at all, much less on a consistent basis. In contrast, this lawsuit provides meaningful relief in the form of judicially-enforceable injunctive remedies.

Finally, there exists a "cognizable danger" that Apple's remedial actions have not been and will not be implemented in an "efficient and effective" manner. *Philips*, 2016 WL 693283, at *10. Both Plaintiffs Penner and Saenz have attempted to install the iOS update that renders

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bricked devices operable again with marginal-to-no results. Likewise, Plaintiff Penner has twice attempted to contact Apple regarding reimbursements, waiting 39 and 30 minutes respectively and receiving only a dropped call or no answer. Based on these facts, it is possible that other putative class members will experience or are experiencing similar circumstances that "discourage[] [them] from obtaining the relief promised" under Apple's remedial program. *Id.* For all these reasons, application of prudential mootness is improper in this case.

B. The Economic Loss Rule Does Not Bar Plaintiffs' Tort Claims Premised On Allegations Of Damage To "Other Property"

Next, Apple argues that Plaintiffs' negligence and negligent misrepresentation claims should be dismissed under Rule 12(b)(6) because they are barred by California's economic loss doctrine. A motion under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Claims alleged in a complaint are sufficient for purposes of Rule 12(b)(6) where they "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). However, "[t]he plausibility standard is not akin to a probability requirement." *Iqbal*, 556 U.S. at 678. Rather, the standard "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of liability. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

Under California law, the economic loss rule does not bar damages to "other property" than the product itself under an unintentional tort theory. *NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1028 (E.D. Cal. Jan. 16, 2013). Here, Plaintiffs who lost data, including photos and videos, as a result of bricking are not barred from recovering for damages to this "other property".

C. Plaintiffs Base Their Negligent Misrepresentation Claims on Alleged "Positive Assertions" By Apple

Furthermore, Apple asserts that Plaintiffs fail to allege "positive assertions" on which they base their negligent misrepresentation claims. But Appellants have pleaded multiple positive assertions by Apple: (1) its representations, first made in February 2014 and again in

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September 2015, that the integrated architecture of Affected Devices "never gets in the way of device usability" and (2) its July 24, 2015 representations that Apple device users "should be able to sit back, relax, and know your phone will . . . be compatible" with Operating System updates "[f]or years."

D. Plaintiffs' Fraud-Based Claims Satisfy Rule 9(b)

Additionally, Apple contends that Plaintiffs' "fraud-based" claims do not satisfy Rule 9(b)'s "particularity" pleading requirement. To the extent a party does not specifically aver fraud, the party's allegations need only satisfy the requirements of Rule 8(a)(2). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." *Id.*

As an initial matter, Apple makes a blanket assertion that Plaintiffs' UCL, FAL, CLRA, and negligent misrepresentation claims "sound in fraud" and must satisfy Rule 9(b). However, fraud is not a necessary element of CLRA, UCL, and FAL claims, and there are "several reasons" to believe Rule 9(b) does not apply to a California negligent misrepresentation claim. *McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3dc 1044, 1059 (C.D. Cal. 2014).[3] Accordingly, "contrary to the suggestion . . . that the court may require fact-specific pleading, the well-settled rule is otherwise except in pleading fraud." *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 46-47, 960 P.2d 513 (1998).

Plaintiffs allege a theory that Apple knowingly and intentionally designed the Affected Devices and Operating Systems to include the bricking features and Apple knowingly and intentionally concealed these facts from consumers and led them to believe otherwise through representations that the devices' features would "never" interfere with device usability and that software updates would be compatible with devices for years. However, Plaintiffs also bring negligent misrepresentation and consumer protection claims premised on the alternative theory

[3] *See also, Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1102-1105 (9th Cir. 2009) (CLRA and UCL); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 1077, 1093 (S.D. Cal. 2011) (FAL); *cf. Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (FAL).

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that that Apple, as the designer of the Affected Devices and the Software Updates, *should have known*—but did not actually know—that features of the integrated architecture of Affected Devices would brick consumers' devices. Thus, Apple's argument necessarily fails with respect to these non-fraud based claims because Rule 9(b)'s pleading standards are inapplicable.

1. Plaintiffs Sufficiently and Particularly Allege Claims Based On Knowing and Intentional Affirmative Misrepresentations

Apple further argues that Plaintiffs failed to plead with sufficient particularity their fraud-based consumer protection claims stemming from affirmative statements because (1) Plaintiffs fail to allege the "who, what, when, where, and how" of Apple's false or misleading statements and (2) Plaintiffs fail to allege actual reliance. Neither contention is availing.

First, Plaintiffs have alleged with particularity the "who" (Apple); the "what" (Apple's affirmative misrepresentations that the security features of its devices would "never" interfere with device usability and that Operating System updates would be "compatible" with their devices for years); the "when" (these representations began as early as February 2014 and continue through the present); the "where" (marketing materials disseminated through, among other sources, Apple's website); and the "how" (Apple, as the designer of the Affected Devices and Operating Systems, intentionally or negligently included security features within them that would brick consumers' devices when they attempted to install Operating System updates).

Second, although actual reliance is a necessary element of fraud or misrepresentation-based UCL and FAL claims, a plaintiff does not "need to demonstrate individualized reliance on specific misrepresentations to satisfy" the requirement. *In re Tobacco II Cases*, 46 Cal. 4th 298, 327, 207 P.3d 20 (2009). Here, Plaintiffs repeatedly and particularly allege that they relied on Apple's specific, affirmative misrepresentations.[4]

[4] Apple asserts that, for the most part, Plaintiffs could not have relied on these misrepresentations based on when Apple made them. But, as discussed above, Apple began making the "never get in the way" misrepresentation in February 2014 and continued making it as of September 2015. All Plaintiffs could have relied on that statement before purchasing their devices or making the update installation attempt that bricked their devices, as those acts occurred subsequent to February 2014 and September 2015. Likewise, all Plaintiffs attempted their software updates subsequent to Apple's July 24, 2015 "compatibility" representation regarding Operating System updates.

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Similarly, under the CLRA, if there have been material misrepresentations made to the class, the Court will infer reliance by the entire class. *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 129 (2009). Here, Apple's misrepresentations regarding the safety of its Software Updates and their compatibility with Apple's hardware were featured prominently in its marketing and on its webpage and, thus, were disseminated to the entire class and a worldwide audience. Accordingly, based on Plaintiffs' allegations, the Court should infer a presumption of reliance for the entire class.

2. Plaintiffs Sufficiently and Particularly Allege Fraud-Based Claims Based On Omissions

Plaintiffs' negligent misrepresentation, UCL, FAL, and CLRA claims that stem from Apple's alleged omissions "can succeed without the same level of specificity required by a normal fraud claim." *MacDonald*, 37 F. Supp. 3d at 1096 (N.D. Cal. 2014) (internal citations omitted). Accordingly, "[a] plaintiff [can plead] justifiable reliance just by alleging that a reasonable customer would not have paid the asking price had the defect been disclosed." *Gray v. BMW of North America, LLC*, 22 F. Supp. 3d 373, 385 (D.N.J. 2014). And, in California omissions-based claims, a plaintiff need allege only that the "nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Tobacco II*, 46 Cal. 4th at 326 (internal quotation marks omitted). A plaintiff may establish "immediate cause" by showing that "in its absence the plaintiff in all reasonable probability would not have engaged in the injury-producing conduct." *Id.*

Here, Plaintiffs expressly alleged that, had Apple disclosed that the Affected Devices or Operating Systems contained features that would brick their devices, utilizing the services of a third-party repair vendor would increase the risk of a bricked device, and attempting to install Operating System updates were the trigger for Error 53, they would not have purchased their devices or attempted to install the updates. Thus, Plaintiffs' omission-based claims under the consumer protection statutes and for misrepresentation by omission are pleaded with particularity.

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E. Apple's Warranties Do Not Preclude Plaintiffs' Consumer Protection Claims Premised on Apple's Affirmative Misrepresentations

Furthermore, Apple argues that Plaintiff Lusson's, Kushmick's, Saenz's, and Denoma's UCL, FAL, and CLRA "fraud" claims are barred to the extent that they are "based on an Error 53 'defect' that manifested after the expiration of Apple's one-year Limited Warranty." (Dkt. 27 at 13).[5] However, by its own terms, the Limited Warranty is only a hardware warranty and is not applicable to Apple software. (Dkt. 28-2 at 2). Plaintiffs allege that Error 53's bricking of Affected Devices arose either from features contained within Software Updates, from the hardware of the Affected Devices, or both. Thus, to the extent that Plaintiffs have claims arising solely from Software Updates, neither the hardware warranty nor any limitations on liability arising therefrom are relevant.

Moreover, Apple acknowledges it is not insulated from liability for affirmative misrepresentations. *Wilson v. Hewlett-Packard*, 668 F.3d 1136, 1141 (9th Cir. 2012). As discussed above, Plaintiffs have sufficiently pleaded such affirmative misrepresentations with particularity.

Additionally, Apple remains liable in this context for "omission[s] contrary to a representation actually made by the defendants." *Hodges v. Apple Inc.*, 2013 WL 6698762, at *4 (N.D. Cal. Dec. 19, 2013). Again, as discussed above Plaintiffs have sufficiently pleaded with particularity Plaintiffs have sufficiently pleaded with particularity Apple's omissions regarding the Affected Devices, the Operating Systems, or both; their intentionally designed bricking features; and Apple's contrary marketing statements.

Finally, Plaintiffs allege a violation of the UCL's "unfair" prong. But courts have rejected claims that, as a matter of law, "selling a product with a defect that does not manifest itself until after the express warranty period is not 'unfair.'" *Peterson v. Mazda Motor of America, Inc.*, 44 F. Supp. 3d 965, 972-973 (C.D. Cal. 2014) (distinguishing *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839, 51 Cal. Rptr. 3d 118, 120 (2006), *as modified*

[5] Apple's argument is fundamentally flawed with respect to Plaintiff Kushmick because Error 53 manifested in his device during the warranty period.

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(Nov. 8, 2006)).[6] Instead of applying the "substantial injury" or "section 5" "unfairness" tests on which *Daugherty* and, consequently, *Wilson* rested, courts may also apply the "balancing test." *Peterson*, 44 F. Supp. 3d at 972. Under that test, an unfair business practice "is one in which the gravity of the harm to the victim outweighs the utility of the defendant's conduct." *Id.* (internal quotation marks omitted).

Here, Plaintiffs allege that: 1) Apple designed and sold Affected Devices and distributed Software Updates that Apple knew contained features that would brick consumers' devices; 2) Apple intended these features to brick consumers' devices, causing them to lose the use of the devices and any data without backup; and, 3) Apple refused to repair or replace the bricked devices without further payment to Apple. These harms vastly outweighed any utility of Apple's knowing and intentional conduct where, for example, Apple simply could have designed the Affected Devices and Software Updates only to disable Touch ID to address Apple's alleged security concerns. Accordingly, Plaintiffs sufficiently have pled a claim under the UCL's "unfair prong."

F. Plaintiffs Have Standing To Seek Injunctive Relief

Next, California federal courts have repeatedly rejected Apple's contention that Plaintiffs lack standing to seek injunctive relief because Plaintiffs are "personally aware of the Error 53 issue and cannot possibly be deceived by any alleged misstatements or omissions about Error 53 in the future" on the basis that courts would "be precluded from enjoining false advertising under California consumer laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter . . . and would never have Article III standing . . . ." *Henderson v. Gruma Corp.*, 2011 WL 1362188, at *7-8 (C.D. Cal. Apr. 11, 2011).[7]. (Dkt. 27 at 14). The Court should follow suit in rejecting Apple's contention. Likewise, despite Apple's alleged remedial actions, Plaintiffs have had, at best, mixed results with Apple's alleged Error 53 software update and, to date, have not received offers under

[6] *See also, McVicar*, 1 F. Supp. 3d at 1054.
[7] *See also, Koehler v. Litehouse, Inc.*, 2012 WL 6217635, at *6 (N.D. Cal. Dec. 13, 2012); *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1045 (N.D. Cal. Mar. 14, 2014).

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Apple's alleged reimbursement program. Accordingly, Plaintiffs still have standing to seek the multiple forms of injunctive relief they seek.

G. Plaintiffs Sufficiently Pleaded A Claim For Unjust Enrichment

Although unjust enrichment in California is generally not considered an independent cause of action," when a plaintiff alleges unjust enrichment, courts "construe the cause of action as a quasi-contract claim seeking restitution." *Astiana v. Hain Celestial Grp.*, 783 F.3d. 753, 762 (9th Cir. 2015). Here, Plaintiffs' Complaint includes the allegations that "The economic benefit of the purchase price of [iPhones], replacement devices and/or services [were] derived by Apple through concealment, misrepresentations, failures to disclose, and/or omission[s.] (SAC ¶ 133).

Apple also asserts that its "Limited Warranty" precludes the plaintiffs from bringing a quasi-contract cause of action. This case involves working devices that were intentionally sabotaged so that Apple could force existing customers to purchase additional devices and/or pay for Apple repairs that were otherwise unnecessary but for the so-called security features within the Affected Devices, the Operating Systems, or both. Accordingly, Plaintiffs have put forth clear allegations which are sufficient to state a quasi-contract cause of action styled as unjust enrichment.

H. If Necessary, The Court Should Grant Leave To Amend

On a motion to dismiss, dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment. *Maya v. Centex Corp.*, 658 F.3d 1060, 1072 (9th Cir. 2011) (reversing dismissal without leave to amend). These rules apply equally to claims sounding in fraud. Complaints dismissed under Rule 9(b) are "almost always" dismissed with leave to amend. *Luce v. Edelstein*, 802 F.2d 49, 56 (2nd Cir. 1986). Thus, for any claims dismissed solely under pleading standards, the Court should grant leave to amend.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Apple's motion to dismiss in its entirety.

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RESPECTUFLLY SUBMITTED this 23rd day of May, 2016.

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